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Aminah bt Ahmad (suing in personal capacity and on behalf of 56 retired civil servant members) v Kerajaan Malaysia & Anor

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–23–04 OF 2017
FAIZAH JAMALUDIN J
9 JANUARY 2020

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Statutory Interpretation — Amending legislation — Validity of — Whether amendment to s 3 and deletion of s 6 of the Pensions Adjustment Act 1980 ('the PAA') by Pensions Adjustment (Amendment) Act 2013 ('the 2013 Act') was ultra vires art 147 of Federal Constitution — Whether the 2013 Act altering pension increment structure put existing pensioners in a 'less favourable' situation — Whether the 2013 Act when read in its entirety in fact provided measures to remedy any adverse effects which might result from changes made to pension increment structure — Whether the 2013 Act was not ultra vires art 147 of the Federal Constitution

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The issue in this case was whether the amendment to s 3 and the deletion of s 6 of the Pensions Adjustment Act 1980 ('the PAA') by the Pensions Adjustment (Amendment) Act 2013 ('the 2013 Act') were ultra vires art 147 of the Federal Constitution. In her instant application, filed both in her personal capacity and on behalf of 56 other government pensioners, the plaintiff sought, inter alia, an order to restore ss 3 and 6 of the PAA as they existed prior to the changes made by the 2013 Act (which came into effect on 1 January 2013) and that the pensions of the plaintiff recipients be adjusted retrospectively based on the formula that existed before the 2013 Act and that they be paid any shortfall due to them. The plaintiff contended that the changes made by the 2013 Act had infringed her fundamental rights and those of the 56 retired civil servants she represented in that the changes had resulted in them receiving a 'less favourable' pension increment. She claimed that the amended s 3(1) which provided for pensions to be increased annually at the rate of 2% would result in a pensioner receiving less than what he would receive if his pension was adjusted under the formula which existed before the coming into force of the 2013 Act. The defendants, in reply, said the 2013 Act had not adversely affected the rights of the plaintiff or the other pensioners and had not reduced their pensions or put them in a less favourable position than before.

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Held, dismissing the application:

(1) Sections 3 and 7 (which deleted s 6 of the PAA) of the Pensions Adjustment (Amendment) Act 2013 were not ultra vires art 147 of the Federal Constitution (see para 35).

(2) In interpreting the changes made by the 2013 Act, it was necessary to, inter alia, read the amended s 3 in its entirety and not just s 3(1) alone. The amended s 3(1) changed the criteria by which pension was adjusted under the PAA. It changed the statutory mechanism for the adjustment of pension from one that was based on the latest revision of an applicable salary scale to one that was based on a fixed rate of increment of 2%pa. The new s 3(2), however, stated that notwithstanding s 3(1), if the 2%pa increase resulted in a situation that was less favourable to an officer who was appointed before 1 January 2013, the Yang di-Pertuan Agong ('YDPA') may by order in the *gazette* prescribe the appropriate higher percentage of increment to be applied in such a case (see paras 21–24).

(3) Furthermore, the amended s 3(3) expressly stated that for the purpose of the order in s 3(2) as aforesaid, the YDPA may prescribe: (a) different percentages of increment for different categories of recipients; and (b) that the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable. Pursuant to s 3A(1) of the PAA, pension received by an officer under any written law shall be adjusted in accordance with s 3(1) while s 3A(3) provided that such adjustment was subject to any higher percentage of increment which may be made by the YDPA under s 3(2). Therefore, if the plaintiff and/or any other pensioner found that they were in a less favourable position under the amended PAA than before, they could apply to the defendants for a higher percentage of increment to be *gazetted* by order of the YDPA pursuant to s 3(2) (see paras 25–27).

(4) It was clear from reading the amended ss 3(1), (2) and (3) together with the new ss 3A(1), (2)(a), (2)(b) and (3) that Parliament had ensured that the constitutional guarantees enshrined in art 147 of the Federal Constitution was preserved by providing the safeguard in s 3(2) of the PAA to address the case of pensioners who found themselves in a less favourable position because of the 2013 Act (see paras 30–31).

(5) The statutory safeguard in s 3(2) of the PAA only applied to an officer who was appointed before 1 January 2013 because any officer appointed after that date would not be in a 'less favourable' position by virtue of the amendments to the PAA since the pension granted to him would be that which was in force on the day he became a member of any of the public services (see paras 33–34).

[Bahasa Malaysia summary

Isu dalam kes ini adalah sama ada pindaan kepada s 3 dan pemotongan s 6 Akta Pelarasan Pencen 1980 ('APP') oleh Akta Pelarasan Pencen (Pindaan) 2013 ('Akta 2013') adalah ultra vires perkara 147 Perlembagaan Persekutuan. Dalam permohonannya ini, yang telah difailkan dalam kapasiti peribadinya dan bagi pihak 56 pesara kerajaan yang lain, plaintif telah memohon, antara lain, perintah untuk mengembalikan ss 3 dan 6 APP seperti yang ada sebelum perubahan yang dibuat oleh Akta 2013 (yang mula berkuatkuasa pada 1 Januari 2013) dan bahawa pencen plaintif penerima diselaraskan secara retrospektif berdasarkan formula yang ada sebelum Akta 2013 dan bahawa mereka dibayar apa-apa kekurangan disebabkan olehnya. Plaintif berpendapat bahawa perubahan yang dibuat oleh Akta 2013 telah melanggar hak asasi dan hak 56 penjawat awam yang sudah bersara yang diwakilinya kerana perubahan tersebut menyebabkan mereka mendapat kenaikan pencen yang 'kurang menguntungkan'. Dia mendakwa bahawa s 3(1) yang dipinda yang memperuntukkan pencen dinaikkan setiap tahun pada kadar 2% akan mengakibatkan seorang pesara menerima kurang daripada apa yang akan diterimanya sekiranya pencennya diselaraskan mengikut formula yang ada sebelum mula penguatkuasaan Akta 2013. Defendan, dalam maklum balas, mengatakan bahawa Akta 2013 tidak menjejaskan hak plaintif atau pesara lain dan tidak mengurangkan pencen mereka atau meletakkannya pada kedudukan yang kurang baik daripada sebelumnya.

Diputuskan, menolak permohonan:

(1) Seksyen-seksyen 3 dan 7 (yang memotong s 6 APP) Akta Pelarasan Pencen (Pindaan) 2013 tidak ultra vires perkara 147 Perlembagaan Persekutuan (lihat perenggan 35).

(2) Dalam mentafsir perubahan yang dibuat oleh Akta 214, ia adalah perlu untuk, antara lain, membaca s 3 yang dipinda secara menyeluruh dan bukan s 3(1) sahaja. Pindaan s 3(1) telah mengubah kriteria yang mana pencen diselaraskan di bawah APP. Ia mengubah mekanisme statutori untuk pelarasan pencen dari suatu yang berdasarkan semakan terakhir skala gaji yang terpakai kepada suatu yang berdasarkan kadar pelarasan yang ditetapkan pada 2% setiap tahun. Seksyen 3(2) yang baharu , walau bagaimanapun, menyatakan bahawa walau apa pun s 3(1), jika kenaikan 2% setiap tahun mengakibatkan suatu keadaan yang kurang berpihak kepada seseorang pegawai yang dilantik sebelum 1 Januari 2013, Yang di-Pertuan Agong ('YDPA') boleh melalui perintah dalam warta menetapkan peratusan kenaikan lebih tinggi yang sesuai agar terpakai dalam kes seperti tersebut (lihat perenggan 21–24).

(3) Selanjutnya, s 3(3) yang dipinda secara jelas menyatakan bahawa bagi tujuan perintah dalam s 3(2) seperti yang disebutkan di atas, YDPA boleh menetapkan: (a) peratusan kenaikan yang berlainan untuk kategori

penerima yang berlainan; dan (b) bahawa peratusan kenaikan yang lebih tinggi hanya akan berlaku untuk tahun tertentu atau mana-mana bahagiannya, dan dalam kes sedemikian, pada tarikh pelarasan patut kena dibayar. Menurut s 3A(1) APP, pencen yang diterima oleh pegawai berdasarkan undang-undang bertulis hendaklah diselaraskan sesuai dengan s 3(1) sementara s 3A(3) memperuntukkan bahawa pelarasan sedemikian adalah tertakluk apa-apa kenaikan peratusan lebih tinggi yang boleh dibuat oleh YDPA di bawah s 3(2). Oleh itu, sekiranya plaintif dan/atau pesara lain mendapati bahawa mereka berada dalam kedudukan yang kurang baik di bawah APP yang telah dipinda daripada sebelumnya, mereka boleh memohon kepada defendan untuk suatu peratusan kenaikan yang lebih tinggi diwartakan melalui perintah YDPA menurut s 3(2) (lihat perenggan 25–27).

(4) Adalah jelas daripada pembacaan ss 3(1), (2) dan (3) yang dipinda bersama ss 3A(1), (2)(a), (2)(b) dan (3) yang baharu bahawa Parlimen telah memastikan bahawa jaminan perlembagaan termaktub dalam perkara 147 Perlembagaan Persekutuan dikekalkan dengan memperuntukkan perlindungan dalam s 3(2) APP untuk menangani kes pesara-pesara yang mendapati diri mereka dalam kedudukan yang kurang baik disebabkan Akta 2013 (lihat perenggan 30–31).

(5) Perlindungan statutori dalam s 3(2) APP hanya terpakai kepada pegawai yang dilantik sebelum 1 Januari 2013 kerana mana-mana pegawai yang dilantik selepas tarikh tersebut tidak berada dalam kedudukan yang 'kurang baik' berdasarkan pindaan kepada APP oleh kerana pencen yang diberikan kepadanya adalah yang mana telah berkuat kuasa pada hari dia menjadi anggota mana-mana perkhidmatan awam (lihat perenggan 33–34).]

Cases referred to

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)

Legislation referred to

Federal Constitution art 147
Interpretation Acts 1948 and 1967 s 14
Pension Ordinance 1951 (repealed by Pensions Act 1980)
Pensions Adjustment Act 1980 ss 2, 3, 3(1), (2), (3), 3A, 3A(1), (2)(a), (2)(b), (3), 3B, 6

Lim Choon Khim (Chin Yan Leng with him) (Chooi, Saw & Lim) for the plaintiff.
Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Faizah Jamaludin J:

INTRODUCTION

[1] This is an application by the plaintiff, Aminah bt Ahmad, in her personal capacity and on behalf of 56 retired members of the public services, against the defendants, the Government of Malaysia and the Director General of Public Services.

[2] In her originating summons, the plaintiff applies for the following reliefs:

(a) a declaratory order that ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 are ultra vires art 147 of the Federal Constitution;

(b) a declaratory order that ss 3 and 6 of the Pensions Adjustment Act 1980 as amended by ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 and in force since 1 January 2013 are ultra vires art 147 of the Federal Constitution;

(c) that the provisions of ss 3 and 6 of the Pensions Adjustment Act 1980, prior to the amendments by ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013, be restored accordingly; and

(d) that the proper adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post 1 January 2013 formula, and any shortfall resulting therefrom be paid to the respective recipients accordingly.

[3] It is the plaintiff's case that the amendment to s 3(1) and the deletion of s 6 of the Pensions Adjustment Act 1980 (Act 238) ('the PAA 1980') by the Pensions Adjustment (Amendment) Act 2013 (Act A1447) ('2013 Amendment Act') are ultra vires art 147 of the Federal Constitution.

ARTICLE 147 OF THE FEDERAL CONSTITUTION

[4] Article 147 of the Federal Constitution states as follows:

147 Protection of pension rights

(1) *The law applicable to any pension*, gratuity or other like allowance (in this Article referred to as an 'award') *granted to a member of any of the public services*, or to his widow, children, dependant or personal representatives, *shall be that in force on the relevant day* or *any later law not less favourable to the person to whom the award is made*.

(2) For the purposes of this Article the *relevant day* is —

(a) in relation to an award made *before Merdeka Day*, *the date on which the award was made*;

(b) in relation to an award made *after Merdeka Day* to or in respect of *any person who was a member of any of the public services before Merdeka Day*, *the thirtieth day of August, nineteen hundred and fifty-seven*;

(c) in relation to an award made to or in respect of any person who first became a member of any of the public services *on or after Merdeka Day*, *the date on which he first became such a member*.

(3) For the purposes of this Article, where the law applicable to an award depends on the option of the person to whom it is made, the law for which he opts shall be taken to be more favourable to him than any other law for which he might have opted. (Emphasis added.)

AMENDMENTS TO THE PENSIONS ADJUSTMENT ACT 1980

[5] Section 3 of the PAA 1980 was amended in 2013 by s 3 of the 2013 Amendment Act and s 6 of the PAA 1980 was deleted by s 7 of the 2013 Amendment Act. The said amendment and deletion came into effect on 1 January 2013.

[6] The PAA 1980 had been amended four times prior to its amendment by the 2013 Amendment Act. It was amended previously by the Pensions Adjustment (Amendment) Act 1983 (Act A568) ('the 1983 Amendment Act'), the Pensions Adjustment (Amendment) Act 2002 (Act A1169) ('the 2002 Amendment Act'), the Pensions Adjustment (Amendment) Act 2009 (Act A1345) ('the 2009 Amendment Act') and the Pensions Adjustment (Amendment) Act 2011 (Act A1411) ('the 2009 Amendment Act') (collectively referred to as 'the previous amendment acts').

[7] The provisions in ss 3 and 6 of the PAA 1980 prior to the amendment and deletion by the 2013 Amendment Act were made by the 1983 Amendment Act, which amended the original ss 3 and 6 of the PAA 1980 to the following:

3 Adjustment of pensions and other benefits of officers and dependants

(1) Pensions and other benefits granted to officers and their dependants under any written law before or on the implementation of any current salary scale shall be adjusted in accordance with the provisions of this Act and shall be paid or be payable with effect from the date of implementation of the current salary scale.

A (2) The pension or retiring allowance of an officer shall be adjusted as provided in the First Schedule.

...

6 Determination of corresponding last drawn salary

B (1) The Director General shall determine the corresponding last drawn salary of an officer.

(2) For the purposes of this Act, 'corresponding last drawn salary' means, in the case of an officer to whom the current salary scale does not apply by virtue of —

C (a) his not having had an opportunity to opt;

(b) his not having opted; or

(c) his not being deemed to have opted,

D for the current salary scale, the equivalent salary that the officer would have drawn under the current salary scale prior to death in service or to retirement had he been in service on the implementation of the current salary scale and had it been applied to him.

E **[8]** As well as deleting s 6 of the PAA 1980, the 2013 Amendment Act made a corresponding deletion to the definition of 'corresponding last drawn salary' in s 2 of the PAA 1980.

F **[9]** The 2013 Amendment Act amended s 3 of the PAA 1980 to the following:

3 Adjustment of pensions and other benefits of officers and dependants

(1) Pensions and other benefits granted to officers and their dependants under any written law shall be adjusted annually by an increment of two percent G in accordance with the provisions of this Act and shall be paid or be payable with effect from January of each year.

(2) *Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation that is less favourable to an officer appointed before the coming into force of this section*, the *Yang di-Pertuan Agong may by order in the gazette prescribe an appropriate higher percentage* H *of increment to be applied in such case*.

(3) For the purpose of an order under subsection (2), the Yang di-Pertuan Agong may prescribe —

I (a) different percentages of increment for different categories of recipients;

(b) that the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable. (Emphasis added.)

[10] Additionally, the 2013 Amendment Act introduced new ss 3A and 3B to the PAA 1980, which sections read as follows:

3A Adjustment of pensions, disability pensions, retiring allowances or injury allowances

(1) *Pensions*, disability pensions, retiring allowances or injury allowances received by an officer under any written law *shall be adjusted in accordance with subsection 3(1)*.

(2) *The amount of pension*, disability pension, retiring allowance or injury allowance *to be used as the basis for the first of the adjustments under subsection 3(1)* —

(a) *in the case of an officer who retired before or on 1 January 2012, shall be the amount of pension*, disability pension, retiring allowance or injury allowance *which had been adjusted on that date*;

(b) *in the case of an officer who retired on or after 2 January 2012*, *shall be the amount of pension*, disability pension, retiring allowance or injury allowance *which had been granted to the officer*.

(3) The adjustment referred to in subsection (1) *is subject to any higher percentage of increment which may be made under subsection 3(2)*.

3B Adjustment of lowest pensions and other benefits

Where an officer is receiving the lowest amount of pension or other benefit payable pursuant to section 8, the said lowest amount shall be used as the basis for the first of the adjustments under subsection 3(1). (Emphasis added.)

THE PLAINTIFF'S CASE

[11] The plaintiff contends that the amendments to the PAA 1980 made by the 2013 Amendment Act had infringed her fundamental rights, and that of the other 56 retired members of the public services that she is representing, which rights are guaranteed under art 147 of the Federal Constitution. This is because the amendments to the PAA 1980 by the 2013 Amendment Act had resulted in them receiving a 'less favourable' pension increment. She argues that the 2% annual increment introduced by the 2013 Amendment Act is less than what a pensioner would receive if his pension is adjusted under the original ss 3 and 6 of the PAA 1980.

[12] The plaintiff in para 14 of her affidavit affirmed on 27 April 2017 ('plaintiff's affidavit in support') illustrates the calculation in respect of an officer of the public service who retired at the grade 'Jusa C', which she avers shows that the implementation of the 2% annual rate of pension increment is less favourable that the adjustment of pension based on salary revision prior to the amendments made by the 2013 Amendment Act. The officer in the illustration commenced his service on 5 November 1971 and retired on 7 July 2004.

[13] In para 5 of her further affidavit affirmed on 28 February 2019 ('plaintiff's affidavit (2)'), the plaintiff provides a further illustration of a pensioner who retired at grade 'Jusa C'. However, she did not state when this pensioner commenced his service and when he retired from service. She says that the said pensioner was drawing a pension of RM4,763.47 on 31 December 2011 and that following a salary revision on 1 January 2012, the pensioner's pension was adjusted to RM7,200 under the PAA 1980, which represented a 51.15% adjustment of his original pension as opposed to the 2% annual increment pursuant the amendment to the PAA 1980 by the 2013 Amendment Act. Further, she says that 'if the pension of RM4,763.47 is increased annually by 2%, it will take approximately 10 years to reach the pension of RM7,200'.

[14] The plaintiff in para 5 of her further affidavit in reply affirmed on 29 April 2019 ('plaintiff's affidavit (3)') avers the PAA 1980 prior to the amendment by the 2013 Amendment Act (which she refers to in the affidavit as 'the pre-amended Act') introduced 'a new two-pronged principle that pensions be adjusted on current salaries and intricately linked to their respective grade and rank in the civil service. This gave the pensioners an assurance of enjoying a continuous pension of comparable amounts to those retired subsequently on similar grades and ranks'.

THE DEFENDANTS' CASE

[15] The defendants' case is that prior to the PAA 1980, there were no provisions for the adjustment of pensions granted. The defendants submit that prior to 1980, the legislation on pension in force by virtue of the Pension Ordinance 1951 involved two principles namely; (a) grant of pension; and (b) computation of pension, gratuity and other benefits in accordance with the regulations.

[16] The defendants argue that the amendments to the PAA 1980 by the 2013 Amendment Act does not alter the plaintiff's and the other pensioners' rights as pensioners. The defendants say that the amendments to the PAA 1980 gives the pensioners an annual increment of 2% to their pensions.

[17] The defendants' submit that as the amendments by the 2013 Amendment Act to the PAA 1980 had not reduced the amount of the pensioners' pension so as to put them in a less favourable position than prior to the amendments in question, the plaintiff's application should be dismissed.

ANALYSIS

[18] The issue before this court is whether the amendment to s 3 and the deletion of s 6 of the PAA 1980 by the 2013 Amendment Act is ultra vires art 147 of the Federal Constitution.

[19] The plaintiff has moved this court to determine the constitutionality of the amendment to s 3 of the PAA 1980 and the deletion of s 6 of the PAA 1980 by the 2013 Amendment Act. The Federal Court in the landmark case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 reiterated that it is a basic principal of statutory interpretation that there is always a strong presumption in favour of the constitutionality of provisions in a statute. Zainun Ali FCJ in delivering the decision of the Federal Court explained the principle as follows:

> [93] *The preliminary position is that there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action.* The burden is upon him who challenges the provision to show that they are unconstitutional (*Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208, *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701, *Public Prosecutor v Azmi Sharom*[2015] 6 MLJ 751; [2015] 8 CLJ 921). The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid. (Emphasis added.)

[20] The Interpretation Acts 1948 and 1967 ('the Interpretation Acts') applies, inter alia, to the interpretation of all Acts of Parliament enacted after 18 May 1967. Section 14 of the Interpretation Act provides that:

> Every Act shall be divided into sections, each of which shall have effect as a substantive enactment without any introductory words.

[21] Therefore, as s 3 of the PAA 1980 is a substantive enactment, anyone interpreting the amendment made by the 2013 Amendment Act to s 3 of the PAA 1980 must read the amended s 3 in its entirety ie all the subsections that make up s 3 and not just sub-s 3(1) alone.

[22] Subsection 3(1) as amended by the 2013 Amendment Act changed the criteria by which pension is adjusted under the PAA 1980. It changed the statutory mechanism for the adjustment of pension from one that is based on the latest revision of an applicable salary scale to an adjustment mechanism that is based on a fixed rate of increment of 2%pa.

[23] Subsections 3(2) and 3(3) of the PAA 1980 as amended by the 2013 Amendment Act stipulates that:

> (2) Notwithstanding subsection (1), *where the application of the specified rate of increment would result in a situation that is less favourable to an officer appointed before the coming into force of this section, the Yang di-Pertuan Agong may by order in the gazette prescribe an appropriate higher percentage of increment to be applied in such case*.
>
> (3) For the purpose of an order under subsection (2), the Yang di-Pertuan Agong may prescribe —
>
> (a) *different percentages of increment for different categories of recipients*;
>
> (b) that *the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable*. (Emphasis added.)

[24] The natural and ordinary meaning of sub-s 3(2) is that notwithstanding the provision in sub-s 3(1), in the event that the specified rate of increment of 2%pa, *would result in a situation that is less favourable* to an officer appointed before 1 January 2013, His Majesty the Yang di-Pertuan Agong ('YDPA') may by order in the *gazette* prescribe the appropriate higher percentage of increment to be applied in such a case.

[25] Subsection 3(3) expressly states that for the purpose of the order in sub-s 3(2), His Majesty the YDPA may: (i) prescribe different percentages of increment for different categories of recipient, and His Majesty may also; and (ii) prescribe that the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable.

[26] The new sub-s 3A(1) of the PAA 1980 states that pension received by an officer under any written law shall be adjusted in accordance with sub-s 3(1). Pursuant to sub-s 3A(3) such adjustment pursuant to sub-s 3(1) is subject to any higher percentage of increment which may be made by His Majesty the YDPA under sub-s 3(2).

[27] Therefore, if the plaintiff and/or any other pensioners find that as a result of the amendment in the pension adjustment mechanism to a fixed increment rate of 2%pa had resulted in them being put in a position that is less favourable than their position prior to the amendment to sub-s 3(1) of the PAA 1980, any such pensioner can apply to the defendants for a higher percentage of increment to be *gazetted* by order of the YDPA under sub-s 3(2) of the PAA 1980.

[28] As regards the officer who retired at grade 'Jusa C' used by the plaintiff

in plaintiff's affidavit (2) to illustrate her point that the amendment to s 3 of the PAA 1980 by the 2013 Amendment Act resulted in a less favourable position to the plaintiff and her fellow pensioners, I must point out that sub-s 3A(2)(a) of the PAA 1980 stipulates *that the basis for the first of his adjustments under* sub-s 3(1) *shall be his pension that had been adjusted on 1 January 2012*, which in the plaintiff's example is RM7,200. The plaintiff says that the pensioner was drawing a pension of RM4,763.47 on 31 December 2011 and claims that based on the amendment to s 3 of the PAA 1980 of an annual increment of 2%pa, it would have taken ten years for the 'Jusa C' officer's pension to be adjusted to RM7,200.

[29] With respect to the plaintiff, her claim is incorrect. Based on the provision in the new sub-s 3A(2)(a) of the PAA 1980, the pension of the 'Jusa C' officer in her example would be adjusted at the rate of 2%pa from 1 January 2013 *based on the pension sum that was adjusted on 1 January 2012* ie RM7,200 and not RM4,763.47. Therefore, the plaintiff's averment that it will take ten years from 1 January 2013 for the officer's pension to be adjusted to RM7,200 by reason of the amendments made to the PAA 1980 by the 2013 Amendment Act is erroneous.

[30] It is clear to me on reading the amended sub-ss 3(1), 3(2) and 3(3) in its entirety together with the new sub-ss 3A(1), 3A(2)(a), 3A(2)(b), and 3A(3) that Parliament was aware that the amendment from the variable rate of pension adjustment pegged to the latest revision of the applicable salary scale to a fixed rate adjustment of 2%pa could result in certain pensioners or their widows, children, dependants or personal representatives being put in a position that is less favourable from their position prior to the amendments in the PAA 1980 coming into effect.

[31] Therefore, in order to ensure that the constitutional guarantee enshrined in art 147 of the Federal Constitution is preserved and to protect against the likelihood of situations where pensioners or their widows, children, dependants or personal representatives are put in a less favourable position because of the change to the annual fixed rate pension adjustment, Parliament expressly provided a safeguard in sub-s 3(2) of the PAA 1980.

[32] As discussed above, the statutory safeguard provided by Parliament is that pursuant to sub-s 3(2) of the PAA 1980, His Majesty the YDPA may by order in the *gazette* prescribe the appropriate higher percentage of increment to an officer appointed before 1 January 2013 in the event that the fixed rate increment of 2%pa results in a situation that is less favourable to the said officer or his widow, children, dependant or personal representatives. Additionally, for the purpose of the order in the *gazette* pursuant to sub-s 3(2) of the PAA 1980, Parliament included an express provision in sub-s 3(3) that His Majesty the

YDPA may prescribe different percentages of increment for different categories of recipients in accordance with sub-s 3(3).

[33] Why is the statutory safeguard provided in sub-s 3(2) of the PAA 1980 applicable only to situations that is less favourable to an officer appointed before the coming into force of the amended s 3 ie 1 January 2013? This is because the guarantee in art 147 of the Federal Constitution states that 'the pension granted to a member of any of the public services, or to his widow, children, dependant or personal representatives shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made'.

[34] Article 147 of the Federal Constitution stipulates that 'relevant day' for a person who was granted his pension after Merdeka Day or a person who first became a member of any of public services on or after Merdeka Day is 'the date on which he first became such a member'. Therefore, any officer appointed after 1 January 2013 would not be in a position that is less favourable by virtue of the amendments to the PAA 1980 since the pension granted to him is that in force on the day he became a member.

DECISION

[35] For the reasons above, I find that ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 are not ultra vires art 147 of the Federal Constitution.

[36] I also find that s 3 of the Pensions Adjustment Act 1980 as amended by s 3 the Pensions Adjustment (Amendment) Act 2013 is not ultra vires art 147 of the Federal Constitution.

[37] The plaintiff had also prayed for a declaration that s 6 of the Pensions Adjustment Act 1980 as amended by s 7 the Pensions Adjustment (Amendment) Act 2013 is ultra vires art 147 of the Federal Constitution. Section 6 of the PAA 1980 was not amended by s 7 of the 2013 Amendment Act, it was deleted. Therefore, since s 6 had been deleted, it is impossible for this court to make a declaration that s 6 of the Pensions Adjustment Act 1980 as amended by s 7 of the Pensions Adjustment (Amendment) Act 2013 is ultra vires art 147 of the Federal Constitution.

[38] The plaintiff's application is accordingly dismissed.

[39] There is no order as to costs.

Application dismissed

Reported by Ashok Kumar